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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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## No. 444

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STANLEY J. ORLOFF,

*Petitioner,*

*vs.*

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## REPLY BRIEF FOR PETITIONER

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limitation which Congress had in mind and which carries out the purpose of the statute, in favor of a meaningless limitation invented by it. The purpose and policy of the statute was to secure needed doctors in the armed services who could not otherwise be obtained under the regular draft. Laboratory technicians can readily be obtained from draftees under the age of twenty-six after approximately two or three months of training (R. 38).

Congress did not authorize, and would not have authorized, a special draft of doctors so that they could be used as laboratory technicians. The construction of the court below produces a perfectly arbitrary result in clear conflict with the statute. Although the only conceivable justification for the statute is to supply the armed services with doctors, the court's construction of the statute permits the armed services to remove a doctor from civilian life, to place him in the army, and then to refuse to utilize his professional skill. Such a construction of the statute does not serve to satisfy the army's need for doctors, and it removes doctors from civilian life where they are sorely needed. Moreover, it subjects the individual doctor to a serious and discriminatory hardship without any corresponding public benefit.

In addition, the court below said that it reads the Act as merely describing "additional classes of men eligible for induction," and that there is nothing to indicate that men drafted under this Act are to be treated differently from those inducted under the regular draft.

Such an assumption ignores not only the purpose of the legislation and the entire legislative history but a whole host of differences. It ignores the fact that persons are to be inducted under this statute only under special Presidential Proclamation and only after special calls for persons in needed specialist categories. It ignores the fact that

persons inducted under this Act are inducted for "service" only, and not for "training and service" as are all other draftees. It ignores the fact that the statute provides that persons inducted thereunder are to be denied the benefits of 37 U. S. Code sec. 234b, a provision which applies only to commissioned officers. It ignores the fact that the same statute provides for the transfer of officers holding commissions in the Medical Corps from one service to another. It ignores the fact that the regulations of the Selective Service Administration promulgated for the implementation of the Act are entirely separate and distinct from the regulations covering other inductees. It ignores the fact that these regulations contemplated that registrants thereunder will be commissioned and will be inducted only if the armed forces have certified that they will be accepted for service in a specialist category.

The opinion below also considered of import the fact that at the hearings before both the House and Senate Committees, representatives of the American Medical Association and American Dental Association proposed an amendment to the bill prohibiting the induction of men who had been refused commissions by the armed forces, but that the bill was not so amended. However, none of the members of the Committees holding hearings ever expressed disagreement with the purpose or intent of this proposed amendment. On the contrary, their expressions at the time indicated general agreement with the representatives of the associations. (Senate Hearings at 26, House Hearings at 7193.) There is no basis either in the hearings or the legislative debates to support the conclusion that the Committees considered the proposals of the two associations and then rejected them as being contrary to their intent and purpose. Quite the contrary is obvious from the hearings and the debates as shown by the excerpts quoted above. The spokes-

men for the Committees reported to the House and the Senate that both the American Medical Association and the American Dental Association had approved the bill,[12] apparently unaware of any conflict of views between themselves and the associations. Congress assumed as a matter of course that doctors would be commissioned, and the representatives of the military assured them that all doctors would be commissioned. The suggestion made by the two associations, if it was considered by the Committees at all, and there is no evidence that it was ever examined, let alone considered,[13] under the circumstances could very well have been ignored because of the congressional belief that the suggestion was purely superfluous and unnecessary. If one must speculate, it was quite possible that Congress failed to enact the proposal of the medical and dental associations because the bill, although concerned primarily with doctors and dentists, did authorize the induction of other "allied specialists." And although it was perfectly clear and unquestioned that doctors and dentists would be commissioned in the medical and dental corps, the exact status of the "allied specialists," such as osteopaths or pharmacists, in the armed services was none too clear.

It was realized by Congress that the proper utilization of these specialists depended upon their being given the rank or status required by Armed Forces regulations. For example, a doctor must be commissioned at least as a 1st Lieutenant. On the other hand, such a requirement does not, or may not, exist for other specialists; and the same or even more stringent requirements may be necessary for still others. Thus, if the Act passed specifically required that

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[12] Senate, 96 Cong. Rec. 13709, House, 96 Cong. Rec. 13855, 13861, 13864.

[13] See statement of Senator Gurney, after conclusion of the testimony of Dr. Adams of the American Dental Association: "In general, I would agree with most of the statements he has made for the association. I have not had time to go over the bill presented carefully, but certainly will do that." (Senate hearings, page 26.)

all *doctors* and *dentists* inducted under it be commissioned, as proposed, then other specialists, in the event of their future induction, would be faced with the similar reasoning as that advanced here: the inclusion of doctors and dentists, as specifically requiring commissioning, excludes others as classes which may be commissioned.

If the rejected legislation had been adopted, then every time that the President found need to induct another category of specialists, a Congressional hearing would be required to determine whether existing military regulations required commissioning for such specialists to be fully utilized. In event such regulations existed, Congress would have to amend the statute.

Such a procedure would have been cumbersome, inefficient, costly, and unnecessary if there was an agreed interpretation of what the word "service" meant in the proposed legislation. And, we submit, there was an agreed interpretation. By "service," it was meant that specialists would serve in their specialist capacities. To guarantee that result, they would, if inducted, be given the necessary rank or status required by the regulations. This is the clear import of the legislative history. The Congress, assured in advance of the administrative interpretation of the word "service," enacted more flexible legislation to meet the requirements of possible future induction of other specialist categories.

Admittedly, this is speculation, but it conforms with the objective facts far more closely than does the speculation of the court below. And as a minimum it serves to prove that the failure of Congress to pass a clarifying amendment to a statute, especially when that failure is accompanied by silence, is always open to two opposing inferences—either that Congress was opposed to the intent of the clarification, or else that it believed the clarification unnecessary because the statute as it stood already covered the problem. The possibility of such mutually conflicting inferences has led

this Court to hold that no inference at all should be drawn. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47.

## VI. *The Canons of Statutory Construction Compel the Interpretation Contended for by Petitioner*

This Court has laid down as standards for statutory construction that statutes should be construed so as to effectuate the clear intent and purpose of the legislature and in accordance with the policy and purpose of the statute, *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377; *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6; *United States* v. *C.I.O.*, 335 U. S. 106; so as to avoid arbitrary and unreasonable results, *United States* v. *Katz*, 271 U. S. 354; *United States* v. *American Trucking Associations*, 310 U. S. 534; and so as to avoid constitutional questions, *United States* v. *C.I.O.*, *supra*, *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481.

All of these canons require that the present statute be interpreted so as to require that the petitioner be utilized as a doctor. That was plainly the intent and purpose of Congress and the statute. To construe the statute otherwise, so as to permit the Army to use the petitioner as it sees fit, is clearly arbitrary and unreasonable and raises a serious constitutional question.

## VII. *The Statute Should be Construed so as to Avoid its Unconstitutionality*

Congress in enacting this statute recognized its discriminatory nature, but the Committee which drafted the bill justified it on the thesis that the needs of the armed services for doctors required its enactment:

> Mr. Kilday: [speaking for the Committee] The fact that this is discriminatory legislation is frankly admitted by the committee. It singles out one profession, and its allied professions, and provides for their induction into the service where others of their own age

group are not inducted. I think it should be stated that the American Medical Association and the other associations affected by the bill have endorsed it. They recognize the need for medical service to the extent they are willing to accept this discriminatory legislation in the public interest.

* * * * * * * * *

Mr. Wilson of Oklahoma. In view of the needs of the time, is it the position of our committee that this legislation is proper and will be sustained under the constitutional authority of the Congress to raise and maintain an Army?

Mr. Kilday: We so believe. While we regard it as being discriminatory, we think it is clearly within the provision of the Constitution which provides that the Congress shall raise and maintain an Army. You cannot maintain an Army without adequate medical personnel. We had similar legislation during the war period. That was gone into rather thoroughly and I for one on the committee contend it is within the provisions of the Constitution.

Mr. Clemente: Mr. Chairman, will the gentleman yield?

Mr. Kilday: I yield to the gentleman from New York.

Mr. Clemente: As an added inducement, is it not a fact when doctors are called into the armed services they are given at least a first lieutenant's grade?

Mr. Kilday: That is correct. I point out the fact that it is discriminatory, because when you come to try to explain the provisions of this bill as other provisions of law may affect other groups, you cannot reason this out on a logical basis, because this is an individual group that is picked out of the population, subjected to special obligations and services, and entitled to certain privileges and advantages." (96 Cong. Rec. 13861).

Admittedly, a statute drafting doctors for the purpose of utilizing them as doctors would be a reasonable classification and would be sanctioned because of the undoubted

need of the military for doctors. But if the only justification offered is removed, and over-age doctors can be drafted for general use, the statute then becomes arbitrary and unreasonable. A statute so arbitrary and unreasonable would clearly be in violation of the Fifth Amendment. See *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Since the military's need for doctors is the only basis upon which the induction of doctors as a class can be justified, their use for any other purpose is either beyond the scope of the statute, or, if held to be authorized by the statute, would to that extent render the statute unconstitutional.

In *Ex Parte Endo*, 323 U. S. 283, this Court said:

> We have . . . favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality . . . We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. (At 299-300).
>
> . . . If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.
>
> . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized. (At 302)

To construe the statute as authorizing the induction of the petitioner for any other purpose than his utilization as

a doctor, would render the statute clearly arbitrary and discriminatory in violation of the Fifth Amendment. It would permit him to be inducted, although otherwise exempt because he was over-age, solely because he was a doctor, but without relation to the Army's need for his services as a doctor. Further, because he was inducted under this statute and not under the regular draft, he would be denied the parents deferment which is granted all other regular inductees. [14]

All this would be authorized without regard to any rational basis in terms of the military's need for his services. Concededly, some reasonable leeway must be afforded the armed services in the administration of the statute. Thus the armed services should have power to deal with the situation of an inducted doctor who refuses a commission. Undoubtedly, one inducted under the statute should not be permitted to escape service entirely by the simple device of refusing to accept a commission. [15] Similarly the armed services could reasonably be allowed a short period of time in order to determine whether or not it wishes to commission a doctor and utilize his services as a doctor, [16] and a short delay in commissioning a doctor because of administrative reasons probably would not be a violation of the statute.

But neither of these situations apply to the petitioner. The petitioner has indicated his willingness to accept a commission and his application for a commission has been rejected. The petitioner clearly falls in the category of one whom the Army does not want as a doctor and whose services as a doctor are presumably not needed by the

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[14] See pp. 20-21, *supra*.

[15] This very situation was anticipated in the hearings before the House Committee. See testimony of Brig. Gen. Robinson, *supra*, page 16.

[16] It should be noted that the Selective Service regulations, discussed supra, p. 21, require that this determination be made before and not after induction.

## III. The Government's Treatment of Petitioner Is Arbitrary and Discriminatory, and a Violation of the Fifth Amendment.

If petitioner is being used as a doctor, then he alone of all Army doctors is a private, at a private's pay. Other Army doctors with similar responsibilities and duties are at least first lieutenants; if they have petitioner's age and experience, they are captains.[6]

This discrimination against petitioner is not the withholding from him of a gratuity given to others. He is being denied what was intended as a partial compensation for the discrimination in drafting doctors at an age when persons generally are immune from the draft and without regard to parents' deferments. Thus petitioner is suffering a double discrimination. He is in the Army though over age and a parent, yet he is not receiving the pay and status of every other doctor.

Such a singling out of petitioner is at once harsh and irrational. It is additionally offensive because the punishment is visited on petitioner only because he exercised a right guaranteed by the Federal Constitution. Under these circumstances, we submit, the retention of petitioner as a private deprives him of liberty without due process of law.

The Army has refused to commission petitioner because he claimed his constitutional privilege. The Army refuses to commission other doctors if they do not meet the Army's requirements as to height, color perception, moral character, professional competence, etc. But these others it rejects for service altogether; it does not draft them as privates. Thus it is punishing petitioner only because he

[6] See 32 C.F.R. 561.18(b), setting out the age and experience standards for Army ranks.

had the temerity to claim a privilege guaranteed him by the Constitution.

The government represents that since the Army could not, as it says, commission petitioner because of his assertion of his constitutional privilege, its only reasonable alternative was to keep him in the armed services as a private. But the truly reasonable alternative was the same as if it had refused to commission petitioner for lack of height—not to take him at all.[7] The same situation holds true of the argument that the government's action is dictated by security considerations. Whatever may have impelled the Army to refuse petitioner a commission cannot possibly impel or justify it to keep him in the service at a rank and pay below all other doctors.

That the Army is simply punishing petitioner because he claimed his constitutional privilege is illuminated by the specious nature of the justifications given for denying him a commission. One justification advanced is that to commission loyalty risks would diminish the obedience required from non-commissioned personnel. Yet the government also argues that the petitioner, though a private, also gives orders to nurses and medical technicians who outrank him and obtains their "disciplined obedience" "without question" (Br. pp. 12, 36). Indeed, the government concedes that the obtaining of such obedience is necessary for the proper functioning as a doctor.

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[7] The respondent's contention that one who is denied a commission by the Army, despite his willingness to serve, is on the same footing as one who seeks to evade service by rejecting a commission (Br. pp. 23-24), is obviously without merit, particularly since the function of the draft law is to coerce doctors to apply for commissions. Equally without merit is the fanciful suggestion that some doctors might seek to "escape service by refusing to answer loyalty questions" (Br. 25). Obviously, the Army's discretion in deciding when to tender a commission should not and could not be controlled by a doctor's refusal to answer questions. The Army could always tender him a commission if it felt satisfied with his loyalty and if it wanted him in spite of his dishonesty.

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## REPLY BRIEF FOR PETITIONER

The government's brief (pp. 16-17) confesses error on the issues presently before the court: whether a doctor drafted under the Doctors Draft Act must be utilized as a doctor, and whether, if the Army refuses so to utilize him, he must be released.[1] On the basis of the government's confession, and the record before the Court, the decision below should

[1] Although the government frankly admits that under the statute the petitioner must be utilized as a doctor, it suggests (p. 17, fn. 6) that the Court of Appeals decision may have been correct in that the use of the petitioner as a laboratory technician might be considered to be a utilization of his services as a doctor. Of course, the record indicates quite clearly that this assignment as a laboratory technician did not utilize peti-

be reversed and remanded with directions that the petitioner be released from the Army.

The government, however, suggests that this Court should consider the case on the basis of the petitioner's present Army assignment, which was made subsequent to the decision of the Court of Appeals. The government thus raises these problems: (1) Whether petitioner is now being utilized as a doctor, and (2) Whether the Doctors Draft Law requires that all doctors drafted thereunder be offered a commission by the armed services.

In our view, the entire record, including the additional data presented by the government, demonstrates that the petitioner is not now being utilized as a doctor, and in fact cannot be so utilized so long as the Army refuses to commission him. It is also our position that the Doctors Draft Law requires that all doctors drafted thereunder be offered a commission by the armed services. Accordingly, we assert, the petitioner's present assignment should not alter the result, since the petitioner should still be ordered released from the Army.[2]

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tioner's training as a doctor (R. 34-39), and certainly the Court of Appeals did not think so since it rested its decision on the ground that it was not necessary to utilize petitioner as a doctor. Although the government does not seriously argue that petitioner's designation as a laboratory technician was a utilization of the petitioner as a doctor, its suggestion to that effect does demonstrate that the government has an unusual view of the function and role of a doctor.

[2] Even if the Army were in fact utilizing the petitioner as a doctor in full compliance with the statute, it would still be necessary to reverse the decision below. That decision is in any event erroneous and should be corrected. Moreover, a defendant's voluntary granting, pending litigation, of a continuing relief requested by a plaintiff does not resolve the dispute or make the controversy moot. *National Labor Rel. Bd.* v. *Pennsylvania G. Lines*, 303 U.S. 261; see *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334; *Federal Trade Comm.* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43. In the absence of an effective restraint, the Army would be free, under the rule of the lower courts, to utilize the petitioner virtually without restriction.

## I. The Petitioner Is Not Presently Being Utilized as a Doctor.

The Government suggests that the Court should at this stage, on the basis of certain alleged undisputed facts presented by the government outside of the record, make a finding that the petitioner is at the present time being utilized as a doctor. We do not agree with the government as to which facts are undisputed. Moreover, in our view, those facts which actually are undisputed clearly demonstrate that the petitioner is not being utilized as a doctor and that under Army regulations and procedures he cannot be so utilized so long as the Army refuses to grant him a commission.

The facts which actually are undisputed are these:

1. The petitioner is a private in the Army.

2. He was originally classified as a laboratory technician. Subsequently, after the decision in the Court of Appeals and following the issuance of a stay by Mr. Justice Douglas, he was assigned, still as a private, to Madigan Army Hospital with a designation of "psychiatrist" and with the duties as set out in Appendix B of the government's brief. He was, however, informed that he may not do the following things (see petitioner's affidavit attached to his Reply to the government's opposition to certiorari and attached hereto as Appendix A):

a Prescribe or order any drugs, including sedatives.

b. Administer or supervise any of the "shock" or "convulsive" therapies, which constitute the single, most effective, widely used, and generally accepted method of treatment of psychiatric patients.

c. Give injections of any kind, including the intravenous administration of such drugs as pentothal or amytal. This

latter procedure is often an exceedingly important therapeutic aid.

d. Perform any surgical procedures and particularly the spinal puncture, which is frequently imperative in the practice of psychiatry.

e. Be a member of the Medical Board, for which all medical corps officers are eligible, which board diagnoses and recommends the disposition of patients.

f. Be a member of the Therapy Board, which board decides which patients shall have shock therapy.[3]

In dispute is whether or not under Army regulations and practice a non-commissioned person can function as a doctor. But the respondent's contention that Army regulation and practice are no barrier to the utilization of a private as a doctor rests solely on the naked assertion in the respondent's brief. The contention is admittedly in conflict with the stipulation made by the respondent in the court below (See Govt. Br. p. 20). It conflicts also with the testimony of the representative of the Surgeon General before the House Committee considering the doctor's draft statute (see our main brief pp. 16-18). It is in conflict with the statements made by representatives of the Army to the petitioner, that he could not be utilized as a doctor unless he was commissioned (R. 2, 3, 8, 9, 12, 14). It is also in conflict with the respondent's admission in its brief that at least since 1947, every doctor in the Army was a commissioned officer until the petitioner's case arose

[3] The government contends that the restrictions imposed on petitioner with regard to the administering of shock and convulsive therapy and acting as a member of the Therapy Board are restrictions normally placed on other psychiatrists (Br. pp. 13, 34, 35). The petitioner disputes this. He contends that he is the only "doctor" assigned to psychiatry who is not permitted to administer shock or convulsive therapies or be a member of the Therapy Board. He specifically denies, as contended by respondent, that these functions are limited to the Chief and Assistant Chief of the Service.

(Govt. Br. pp. 19-20). In short it is perfectly apparent that the first time it ever occurred to anyone that anyone not a commissioned officer can function as an Army doctor was when it was raised by the Solicitor General in this Court in opposition to the petition for certiorari. We suggest also that the Solicitor General's view is not only novel, but that it is also in violent conflict with reality.

It is evident that the government is seeking to deny incontrovertible facts in order to rescue its case. When the petitioner was inducted in the Army, it never occurred to anyone that he could be utilized as a doctor in the absence of a commission. When the case was tried in the lower court, the government admitted the obvious, that a commission was indispensable to functioning as a doctor in the armed services. This honest admission of the obvious compelled the government to urge as a proposition of law that the Doctors Draft Law did not require that the petitioner be utilized as a doctor. The government now belatedly finds this proposition of law to be untenable in this Court, and it so confesses. No longer confident of its ability to fudge the law, the government now seeks to fudge the facts by repudiating the stipulation of obvious facts which it made in the lower court.

Of course, it is not merely an accident that the Army shows an unbroken history of requiring that all doctors hold commissions. Such a policy is made inevitable by the nature of Army organization and discipline. To permit doctors to serve as such in the absence of a commission would require not merely a change in regulations, but a complete revolution in Army organization and discipline. To function as a doctor in the armed services, an individual must have authority to requisition supplies and equipment, to prescribe drugs and treatment, to order hospitalization or other treatment for patients, to take men off duty, to

give them limited duty, or to make other disposition of a case. A doctor must also have authority over those who should be his subordinates, *i.e.,* nurses, who hold the rank of at least a second lieutenant, and medical corpsmen. He must also have authority over his patients. In civilian life, these are incidents which flow without question from a doctor's professional standing and from his license to practice medicine. In the military service, such authority only accompanies rank as a commissioned officer.

The respondent's assertion that the petitioner has the same authority over nurses and medical technicians that he would have as an officer (Br. pp. 12, 36) is palpably inconsistent with the realities of military life, assuming as it does that in the Army, authority is independent of rank.

Indeed, in a later portion of its brief, the respondent recognizes the obvious—that in the Army, authority exists only in relation to rank. In urging that the Army was justified in refusing the petitioner a commission because it had some question as to his "loyalty," the government says (Br, p. 25): "The Army could not expect to obtain the necessary disciplined obedience of the non-commissioned personnel if there were any doubt as to the loyalty of their officers." If the petitioner cannot be commissioned because his and other officers' orders would not then be respected, he certainly will not command greater obedience by virtue of being a private. Yet the government concedes that the ability to give orders to nurses and medical technicians, which is lacking in the petitioner, is an essential prerequisite to the proper functioning as a doctor.

The government asserts that it is the general policy of the Army to "determine the manner in which each doctor can best exercise . . . [his] qualifications and the restrictions which have been placed upon the petitioner are based upon an "evaluation of his overall qualifications"

(Br. pp. 12, 33-34). The government thus intimates that the restrictions placed upon the petitioner are akin to those by which the Army would refrain from assigning a general practitioner to psychiatry or a pediatrician to surgery. This suggestion is sheer casuistry. The restrictions placed upon the petitioner have no relation to his professional qualifications and are not placed upon commissioned doctors. In other words, in its "evaluation of . . . . [petitioner's] overall qualifications," the Army has taken into account the fact that the petitioner lacks the "qualification" of being a commissioned officer. Because he lacks commissioned status, the Army has placed upon the petitioner restrictions which effectively prevent his being utilized as a doctor. It is absurd even to suggest that one is engaged in the practice of medicine when he is prohibited from prescribing drugs or sedatives [4] and from having any voice in determining the treatment to be accorded his patients.[5]

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[4] The government asserts (Br. pp. 3, 34-35) that the prohibition against petitioner's prescribing drugs or sedatives stems from security reasons, on the ground that if petitioner could administer drugs and sedatives he would be able to elicit information from his patients. This assertion is completely inconsistent with the memorandum of petitioner's commanding officer that petitioner has full authority to elicit histories or any other information from his patients in the course of psychiatric examination and treatment (Br. p. 31). Moreover the suggestion that the petitioner cannot be permitted freely to elicit information from his patients confirms petitioner's contention that in his present status he cannot properly function as a psychiatrist. (See petitioner's affidavit, infra.) The restriction against prescribing drugs or sedatives is not placed upon commissioned officers, and, in any event, whatever the reason may be for the prohibition, the fact remains that a "doctor" who cannot prescribe drugs or sedatives is not a doctor.

[5] The government argues that petitioner's inability to be a member of the Medical Board, which diagnoses and recommends the disposition of patients, "is not a restriction on his professional duties," since "the Medical Boards are administrative in character and perform duties relating to the internal management of the Army" (Br. pp. 13, 35). This state-

The government's position amounts to an assertion that the petitioner is being utilized as a "doctor" as much as any enlisted man can be. If this be so, nevertheless, it is apparent from the undisputed facts that this utilization is not enough to enable the petitioner to practice as a doctor.

## II. The Doctor's Draft Law Requires That Doctors Drafted Thereunder Be Tendered a Commission.

In fact, then, a person cannot function as a doctor in the Army so long as he lacks commissioned status. But assuming the impossible that petitioner is at once a private and a doctor, there is raised the problem whether doctors inducted under the Doctors Draft must be offered a commission. The legislative history of the statute, set out in our main brief, indicates that that was clearly the congressional understanding and intent, and a prerequisite to passage. Congress was assured by the military that this would be done, and these assurances were used by the committee spokesmen to persuade Congress that the statute's discriminatory treatment of doctors was ameliorated thereby. (See our main brief pp. 19-21.) Further, Congress clearly indicated that the only discrimination in rank and pay which it intended between doctors who volunteer and doctors who were drafted was to deny to the latter an extra compensation of $100 a month. (See our main brief, pp. 17-19.)

The government is wrong in contending that Congress showed a contrary intent by failing to include in the legislation provisions proposed by the American Medical Association and the American Dental Association which expressly stated that all doctors and dentists be commissioned

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ment is disingenuously unsound. It is clear that only doctors sit on Medical Boards, that all doctors by virtue of being doctors are eligible to sit on such boards, and that diagnosing and recommending the disposition of patients is essential to the functioning as a doctor.

before acceptance in the armed services (Br. pp. 21, 22). As noted in our main brief (p. 26), the spokesmen for the congressional committees reported to both the Senate and the House that these two associations had indorsed the bill as presented to the floor. These statements are understandable only on the basis that the spokesmen considered that the bill as presented satisfied the associations' wishes. Indeed, they could hardly have thought otherwise in view of the military's invariable practice and the assurances given them by the armed services that persons drafted under the legislation would be commissioned. Under these circumstances, the omission of the provisions offered by the professional associations was not a rejection of their purpose but a determination that they were completely superfluous and unnecessary to achieve the objective desired. (See our main brief, pp. 25-28.)

The testimony of General Robinson, relied on by respondent (Br. p. 22), does not support the respondent's position, but, on the contrary, tends to contradict it. This testimony, which is set out in our main brief at pp. 16-17, shows that although a person drafted under the act would remain a private if he refused a commission, the Army assured Congress that it would always, without exception, tender a commission. General Robinson's testimony thus does not document the statement that "Congress did not intend to require that the Armed forces either commission or discharge drafted doctors" (Govt. Br. pp. 22-23). It shows, instead that a draftee would not be commissioned only if he affirmatively rejected a commission. That is certainly not the situation here.

The government also sees a problem in the fact that commissioned officers have access to certain classified information, "which could not in any practical way be kept from a particular officer" (Br. p. 25). But there is no reason why the petitioner should see classified information that has no relation to his duties,[8] and it would obviously be far more practical to keep classified information from the petitioner, than to have him function as a doctor in a private's rating.

If security considerations in fact presented any problem whatsoever, it would not be in the rank which the petitioner may hold, but in the nature of the duties, responsibilities and authority which may be assigned to the petitioner. But the government contends that the petitioner, despite the Army's doubts as to his loyalty, has been and can be assigned all the duties, responsibilities and authority necessary to permit him to function as a doctor in the armed services. We contend that this is not so as long as the petitioner is not commissioned. But if we take the government's contention at its face value, its position amounts to the following: security considerations do not prevent the granting to the petitioner of the duties, responsibilities and authority which are accorded doctors in the Army, but security considerations prevent his receiving the rank and pay of other doctors.

If petitioner is given the authority, responsibilities and duties of a doctor, it is perfectly apparent that the denial to him of the rank and pay that goes with this authority, responsibilities and duties, has nothing to do with security, but is simply a deliberately punitive measure taken against the petitioner solely because he exercised his constitutional rights in answering the Army's loyalty questionnaire.

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[8] It should be noted in this connection that doctors, although commissioned officers, are by statute expressly denied authority in line matters. 10 U.S. Code sec. 82.

## Conclusion

Upon the basis of the record made in the lower court, the Doctors Draft Law requires that the decision below be reversed and remanded with directions that the petitioner be released from the Army. The additional data presented by the government with respect to the petitioner's present assignment should not alter this result, for this additional data, plus the record as a whole, show that the petitioner is not presently being utilized as a doctor and cannot be so utilized so long as the Army refuses to grant him a commission. In addition, the Doctors Draft Law requires that doctors drafted thereunder be tendered a commission. Since the Army has made it perfectly clear that it has not and will not tender a commission to the petitioner, the Army should be ordered to discharge him.

Respectfully submitted,

DAVID REIN,
STANLEY FAULKNER,
JOHN CAUGHLAN,
SIEGFRIED HESSE,
*Counsel for Petitioner.*

## APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 86 Misc.

STANLEY J. ORLOFF, *Petitioner*

*vs.*

REX E. WILLOUGHBY, Colonel, United States Army, Commanding Officer, Fort Lawton, Washington

On Motion for Leave to Proceed in Forma Pauperis and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AFFIDAVIT OF PETITIONER IN SUPPORT OF REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE GRANTING OF PETITION FOR A WRIT OF CERTIORARI

STATE OF WASHINGTON,
*County of King, ss:*

Stanley J. Orloff, being first duly sworn on oath, deposes and says:

I am the petitioner above named, and make this affidavit in opposition to the contentions made by respondent in his memorandum in opposition to the granting of the petition for a writ of certiorari.

I am now on detached service from the Casual Enlisted Station at Fort Lawton, Seattle, Washington, to the 9952 TSU-SGO, Madigan Army Hospital, Tacoma, Washington. I am a Private E-2, and a member of the Enlisted Personnel Detachment at Madigan Hospital.

The letter of Colonel John J. Marren, attached to respondent's memorandum, states what duties I am allowed to perform in my present status; it does not set forth the the important functions that I am not able to perform.

Because of the lack of a commission, my own chief, Colonel John J. Marren, Chief of Neuro-psychiatry, and

Colonel Emery S. Alling, Commanding Officer of Madigan Army Hospital, have informed me that I may not do the following:

(1) Prescribe or order any drugs (including sedatives).

(2) Administer or supervise any of the "Shock" or "Convulsive" therapies which constitute the single most effective, widely used, and generally accepted method of treatment of psychiatric patients.

(3) Give injections of any kind including the administration of such drugs as Pentothal or Amytal, intravenously. This latter procedure is frequently an exceedingly important therapeutic aid.

(4) Perform any surgical procedures and particularly the spinal puncture, which is frequently imperative in the practice of psychiatry.

(5) Be a member of the Medical Board (for which all Medical Corps officers are eligible) which board diagnoses and recommends the disposition of patients.

(6) Be a member of the Therapy Board (for which all Medical Corps Officers assigned to the psychiatric unit are eligible) which board decides which patients shall have shock therapy.

Respondent on page 5 of his memorandum, asserts that "At the present time . . . petitioner is being used as a doctor, in the very field of his special training, psychiatry." This assertion is not true.

The above specified functions which I can not perform, are, in fact, the very ones which distinguish the psychiatrist, who must be a physician, from the so called "lay therapist," who also engages in the treatment of mental disorders.

Therefore, one who is prohibited the use of medical techniques in the treatment of psychiatric disorders can not be properly said to be ". . . used as a doctor in the very field of his special training, psychiatry. Further, the inability to perform these distinctly medical functions renders my medical training, medical degree, and the bulk of my specialty training completely useless to the Army."

The peculiar overlapping of the field of psychiatry and

psychology makes it possible to disguise this important fact relating to the present refusal of the Army to utilize my medical training and capacities, for only psychiatry (which I can not practice) requires medical training. Had I been engaged in the practice of general medicine, a specialty such as surgery, or indeed, any other recognized medical specialty except psychiatry, my inability to prescribe drugs, perform spinal taps, do even minor surgical procedures, etc. . , would make any appearance that I am practicing as a doctor impossible. The reality, however, is still the same. I am not practicing medicine.

Moreover, being a private affects adversely the main type of therapeutic procedure in which I am allowed to engage, namely, psychotherapy. The most vital part of this method of treatment is the relationship between the patient and the therapist. In civilian life one's professional status confers a certain amount of authority, confidence and respect so necessary in effective treatment. In the Army (where medical officers are addressed by rank only), the role of a therapist who is a private, is a particularly difficult one. Patients are inclined to be disconcerted by the inevitable revelation, and consequently the confidence so essential to effective practice is hard to establish.

Finally, there is the factor of the relationship to nurses, medical corpsmen and a variety of medical personnel, which is complicated by this eccentric status.

(S.) STANLEY J. ORLOFF,

Subscribed to and sworn to before me this 22nd day of September, 1952.

(S.) JOHN CAUGHLAN,
*Notary Public for the State of Washington, residing in Seattle.*